

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

The Kroger Co.,	:	Case No.: 0-1-02 439
	:	
Plaintiff,	:	Beckwith, J.
	:	Sherman, M.J.
v.	:	
Malease Foods Corp., formerly known as Malese Foods Corp.,	:	MEMORANDUM OF MALEASE FOODS CORP. IN OPPOSITION TO THE KROGER CO.'S MOTION FOR LEAVE TO AMEND ITS MOTION TO SHOW CAUSE AND FOR <u>SANCTIONS</u>
Defendant.	:	

MEMORANDUM IN OPPOSITION

I. Introduction

As shown in Malease's principal memorandum in opposition to Kroger's motion to show cause, Kroger has proceeded upon an entirely incomplete and misleading recitation of the history of the dealings between the parties in arranging for a closing pursuant to this Court's December 7, 2004 Order.

The immutable documentary evidence collectively annexed as Exhibit "A" to Malease's principal memorandum demonstrates the utter ludicrousness of Kroger's position. These exhibits show that since the entry of this Court's December 7, 2004 Order directing a conveyance, Malease has at all times been and continues to be ready to close in compliance with that Order. Malease's only objection was to Kroger's manifestly improper request that the purchase price be

paid into Court and that Malease sign inaccurate and incomplete transaction documents which on their face are false and misleading.

Malease acknowledges its obligation to comply with this Court's Order and it is prepared to do so. Malease's only request is that the assignment documents accurately reflect the fact that they are being executed pursuant to a Court Order which is presently the subject of an appeal before the United States Court of Appeals for the Sixth Circuit. As a matter of fundamental fairness, a prospective purchaser should know that Malease is executing the assignments under compulsion of a Court Order which is the subject of an appeal. This has been Malease's position for the past three months, and it has never changed.

Kroger now comes before this Court with an entirely fabricated contempt argument calculated to obliterate Lawrence Kadish's fundamental right to due process of law in plain violation of the constitutional principles set forth in Krutowsky v. Simonson, 109 Ohio App. 3d 367 (Summit app. 1996). Mr. Kadish is not a party to this action, and the Court does not have jurisdiction over his person. There is no claim in the complaint against him, and he has never been served with process as required by F.R.C.P. 4. Conspicuously, Kroger cites no precedent for the absurd relief it seeks, and of course none exists.

Nothing in the December 7, 2004 Order gives Kroger the right to dictate that the purchase price is to be paid into Court. Similarly, nothing in that Order allows

Kroger to unilaterally put forth a set of inaccurate and misleading closing documents and then demand that Malease sign them in the exact form presented by Kroger under pain of contempt.

Malease accepts Kroger's calculation of the purchase price and continues to be ready, willing and able to close upon payment of this sum **provided** that the assignment document fairly give notice to a prospective purchaser that Malease is executing them with full reservation of rights with respect to the appeal presently pending in the Sixth Circuit.

II. Conclusion

The application by Kroger to amend its motion to show cause is entirely without foundation both in fact and in law and should be denied.

Respectfully submitted,

/s/ R. Gary Winters
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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 2005, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ R. Gary Winters _____
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